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No. 95-345

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Sixth Circuit reversed respondent's conviction for manufacturing marijuana on the ground that the conviction was a "second punishment that violates the Double Jeopardy Clause." Pet. App. 6a. As we demonstrated in the petition (Pet. 7-14), that conclusion embodies three errors of double jeopardy law, will disrupt the enforcement of the criminal laws in the Sixth Circuit, and will significantly contribute to the widespread confusion that exists in the lower courts concerning the applicability of the Double Jeopardy Clause to civil forfeiture statutes. Respondent's brief in opposition does not cast doubt on those propositions or the need for this Court's review.

1. Respondent contends (Br. in Opp. 6-7) that the Sixth Circuit's conclusion that all forfeitures under 21 U.S.C. 881(a)(7) inflict "punishment" for double jeopardy purposes "cannot reasonably be assailed and still be consistent with *stare decisis*," in light of *Austin* v. *United States*, 113 S. Ct. 2801 (1993). As we have explained (Pet. 8-9), however, *Austin* involved the Excessive Fines Clause of the Eighth Amendment, not a double jeopardy claim, and the Court expressly recognized that it "ma[de] little practical difference" in that case, in light of the nature of the Eighth Amendment claim, whether all forfeitures under the statute were considered punitive. 113 S. Ct. at 2812 n.14.

In the present context, it *does* make a difference, and respondent has failed to offer any sound reason why the holding in *Austin* should be transposed to the double jeopardy context. Indeed, in *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984), this Court unanimously concluded that a similarly worded forfeiture statute served goals "plainly more remedial than punitive," *id.* at 364, and that accordingly a forfeiture of goods under it was "not barred by the Double Jeopardy Clause." *Id.* at 366. Until squarely overruled by this Court, that double jeopardy holding controls this case, and the Sixth Circuit was not free to disregard it. See, *e.g.*, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Respondent also contends (Br. in Opp. 6) that the Sixth Circuit's conclusion that forfeitures of drug instrumentalities under Section 881(a)(7) are *always* punitive for double jeopardy purposes does not conflict with *United States* v. *$145,139*, 18 F.3d 73 (2d Cir.), cert. denied, 115 S. Ct. 72 (1994), because *$145,139* involved a forfeiture under a different statute (31 U.S.C. 5316). As the Second Circuit recently observed, however, its general approach to forfeitures of instrumentalities of crime differs from the categorical analysis employed by the Sixth Circuit:

> [W]e are hesitant to conclude that the Supreme Court meant its decision in *Austin*, a case addressing the Excessive Fines Clause, to reformulate the standards [*United States* v. *Halper*, 490 U.S. 435 (1990)] had established for the Double Jeopardy Clause. * * * Only if we read *Austin* and [*Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994),] as making major changes in double jeopardy analysis, sub silentio, would we have to conclude that [a] particularized approach to the question of "punishment" * * * has been cast aside. And, in fact, rather than reading *Austin* or *Kurth Ranch* in this way, we have continued to follow *Halper* and to make individualized, case-by-case determinations of whether particular civil sanctions constitute "punishment" even after *Austin* and *Kurth Ranch* (albeit without discussion of these cases).

United States v. *All Assets of G.P.S. Automotive Corp.*, No. 94-6115 (2d Cir. Sept. 18, 1995), slip op. 7490 (involving a forfeiture secured under 21 U.S.C. 981, and citing, *inter alia*, *United States* v. *Morgan*, 51 F.3d 1105 (2d Cir.), cert. denied, 116 S. Ct. 171 (1995), and *$145,139*, *supra*).

Respondent also contends (Br. in Opp. 3-4) that a detailed examination of the "actual facts of this case" under *Halper* would establish that the forfeiture to which he stipulated inflicted "punishment" on him.

Respondent asserts (*id.* at 4) only that he was not "an affluent drug dealer," that he was deprived of his residence, and that the government did not establish that it incurred any expenses in prosecuting him. Under *Halper*, however, the government is not required to provide an accounting of its costs unless it first appears that "the civil penalty * * * bears no rational relation" to a non-punitive goal. 490 U.S. at 449. That question is not determined "from the defendant's perspective" since "for [him] even remedial sanctions carry the sting of punishment." *Id.* at 447 n.7. In any event, the Sixth Circuit did not rule in respondent's favor based on *Halper* or the peculiar facts of his case, but instead rejected *Halper*'s case-by-case analysis of punishment issues in favor of a categorical approach. It is that conclusion that warrants further review by this Court.

2. Respondent contends that the forfeiture action and the criminal prosecution involved the "same offense" for double jeopardy purposes, because they were "based on the same conduct." Br. in Opp. 7. In *United States* v. *Dixon*, 113 S. Ct. 2849 (1993), however, this Court overruled *Grady* v. *Corbin*, 495 U.S. 508 (1990), and rejected that case's "same-conduct" test to determine whether two statutory provisions define the "same offense." It is now settled that two offenses are not the "same" when each offense has at least one statutory element not shared by the other, under the longstanding rule of *Blockburger* v. *United States*, 284 U.S. 299 (1932). See *United States* v. *Dixon*, 113 S. Ct. at 2856; see also *Witte* v. *United States*, 115 S. Ct. 2199, 2204 (1995). As we have demonstrated (Pet. 11-12), the manufacturing and forfeiture "offenses" at issue here cannot be considered the same under the "statutory elements" test of *Blockburger*.*

Respondent does suggest that the "criminal punishment imposed in this case involved the same statutory elements as the particular forfeiture." Br. in Opp. 7. But respondent's claim is based on a comparison of what "the government claimed and offered to prove" in each case. *Ibid.* That interpretation of *Blockburger* is mistaken. The formulation the Court employed in *Blockburger* turns on the facts that the statute requires to be proved, not those that become relevant in a given case: two offenses are different if "each *provision* requires proof of a fact which the other does not." 284 U.S. at 304 (emphasis added); see

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* Respondent faults us for pointing out (Pet. 12 n.3) that his criminal conviction for manufacturing marijuana did not involve his real property, since the marijuana in question was growing beyond his property line. Br. in Opp. 7-8 n.4. In respondent's view, our reliance on that fact is inconsistent with the "elements" test of *Blockburger*. Respondent's argument confuses two different aspects of the *Blockburger* decision. The better-known holding of that case is, of course, that violations of two statutes do not amount to the same offense if each "requires proof of a different element." 284 U.S. at 304. *Blockburger* also held, however, that repeated violations of the *same* statute (which obviously would be the same offense under the "elements" test) are still different "offenses" if each resulted from a fresh "impulse." *Id.* at 303. Thus, in *Blockburger*, two separate sales of narcotics were held to be different offenses even though the same statute was violated by each. The Sixth Circuit's decision not only misapplied the "elements" test, but also ignored that second holding of *Blockburger*. Even if the marijuana and forfeiture "offenses" were the same under the "elements" test, it remains a fact that respondent's criminal conviction for manufacturing marijuana was *not* based on his growing marijuana on the property that the government sought to forfeit.

also *United States* v. *Woodward*, 469 U.S. 105, 108 n.4 (1985) (alternative theory of liability was available under one of the statutes on which the government relied, even if that was not the theory on which the government proceeded in the particular case); *Albernaz* v. *United States*, 450 U.S. 333, 338 (1981) ("As *Blockburger* and other decisions applying its principle reveal, . . . the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes," quoting *Ianelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975)).

3. The Sixth Circuit's conclusion that the marijuana-manufacturing and forfeiture "offenses" were not part of the same proceeding for double jeopardy purposes conflicts with the decisions of two circuits. See *United States* v. *One Single Family Residence*, 13 F.3d 1493 (11th Cir. 1994); *United States* v. *Millan*, 2 F.3d 17 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994). Respondent does not explain why that conflict does not demonstrate the need for further review in this case.

Respondent asserts instead that reversal of the Sixth Circuit's conclusion might lead to abuses by the government. In particular, respondent notes that a person's invocation of his right against compulsory self-incrimination "can be used against him in the civil forfeiture case." Br. in Opp. 10. That possibility, however, results from this Court's decisions interpreting the Self-Incrimination Clause of the Fifth Amendment, see, *e.g.*, *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), and would remain even if the government sought a civil forfeiture without ever seeking to

punish the property's owner criminally. It is therefore hard to see how that is the sort of practice against which the Double Jeopardy Clause can reasonably be said to afford protection. More pertinent in this case is the fact that the government made clear its intent to proceed against respondent and his property before the protections of the Double Jeopardy Clause ever attached. This therefore is quite plainly not a case in which the government "is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *United States* v. *Halper*, 490 U.S. 435, 451 n.10 (1989). The Sixth Circuit's contrary conclusion warrants this Court's review.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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